statement for purposes of impeaching credit. If an accused or his counsel has reason to believe that the evidence which the witness gives in the witness box differs in material particulars from the police statement he or his counsel can request the court to refer to a particular passage or passages in the statement and the court is obliged to refer to them. Failure to refer to such statement is a denial of justice. (See *Yohannan* v. *R.*).[19] The court then exercises its discretion whether to furnish the accused with a copy of the police statement. The true test when exercising such discretion seems to be that the police statement must afford material for serious challenge to the credibility or reliability of the witness on matters relevant to the prosecution case. (See *Mohamed Fiaz Baksh* v. *The Queen*[20]). If the court finds there is no material to afford a serious challenge to the credibility or reliability of the witness, the accused need not be furnished with a copy of the police statement. In the present case the learned president at the request of counsel had referred to the police statement and he had come to the conclusion that there was no material for serious challenge to the credibility or reliability of P.W.55. I do not think that, merely because he had rejected the application, it can be said that he had failed to exercise his discretion judicially and that he had applied the wrong test in applying the provisions of section 113 of the Criminal Procedure Code.

I have also considered the other grounds of appeal advanced on behalf of appellant No. 2. I do not consider that there are merits in any of them.

The appeal by both the appellants against conviction is dismissed.

I am afraid that the sentence of 2 years' imprisonment imposed by the lower court on appellant No. 1 is out of line when compared with the sentence imposed on Chandrasekaran. What I am stressing as significant is that the learned president found that he was the brain behind the conspiracy, but he did not give expression to it in his sentence. In the circumstances it is only right and proper that he deserves no lesser sentence, if not a heavier one than that imposed on Chandrasekaran. Giving the matter my best consideration I enhance his sentence from 2 years' to 3 years' imprisonment. I do not propose to interfere with the sentence of 2½ years' imprisonment imposed by the lower court on appellant No. 2.

Appeal dismissed.

Solicitors: *Shearn, Delamore & Co.; Athi Nahappan & Co.*

RATTAN SINGH v. PUBLIC PROSECUTOR

[A.Cr.J. (Syed Agil Barakbah J.) November 27, 1970]

[Seremban — Criminal Appeals Nos. 3 & 4 of 1969]

Bribery and Corruption — Accomplice evidence — Whether witness an accomplice — Whether witness comes under protection of s. 18 of the Prevention of Corruption Act, 1961 — What constitutes corroboration — Burden of proof on accused — Prevention of Corruption Act, 1961, ss. 4 and 18.

This was an appeal against the conviction of the appellant on a charge under the Prevention of Corruption Act, 1961. The main ground of appeal was whether the main witness to the charge on which the appellant was charged, was an accomplice and whether as such he came within the protection of section 18 of the Act. The learned president was of the view that it was too early to treat the witness as an accomplice considering the frame of mind that he was in and that mere concurrence short of some actual participation in the crime was not sufficient to make the person an accomplice.

Held: allowing the appeal, (1) in this case the witness played a more active part in the transaction, apart from the bare corrupt payment as he was quite prepared to bribe the appellant and negotiated with other persons for the purpose, and therefore he was not protected by section 18 of the Prevention of Corruption Act and the ordinary rules as regards accomplices therefore applied;

(2) the learned president misdirected himself when he concluded that it was too early a stage to treat the witness as an accomplice;

(3) the learned president was wrong in holding that the silence of the appellant when questioned by the police pointed to his guilty mind;

(4) in the circumstances of this case and taking into consideration the evidence of the appellant and his witness and in the light of the various irregularities in the prosecution case, the learned president had failed to consider the defence adequately in accordance with accepted principles and therefore the appeal must be allowed.

Cases referred to:-

(1) *Daimon bin Banda* v. *Public Prosecutor* [1953] M.L.J. 23.

(2) *Soosay Dass* v. *Public Prosecutor* [1951] M.L.J. 57.

(3) *Lionel de Silva* v. *R.* [1956] M.L.J. 203.

(4) *R.* v. *Mullins* 3 Cox C.C. 526.

(5) *R.* v. *Price* [1968] 2 All E.R. 282.

(6) *Trowell* v. *Public Prosecutor* [1946] M.L.J. 41.

(7) *R.* v. *Ambler* [1938] 2 W.L.R. 225.

(8) *Davies* v. *Director of Public Prosecutions* [1954] 1 All E.R. 507.

(9) *R.* v. *Whitehead* [1929] 1 K.B. 99.

(10) *Mohamed Ali* v. *Public Prosecutor* [1962] M.L.J. 230.

(11) *Ah Mee* v. *Public Prosecutor* [1967] 1 M.L.J. 220.

(12) *R.* v. *Prater* [1960] 1 All E.R. 298.

(13) *R.* v. *Norman Davis* 43 Cr. App. R. 215.

(14) *R.* v. *Naylor* 23 Cr. App. R. 177.

(15) *R.* v. *Leckey* 29 Cr. App. R. 128.

(16) *Satkuru* v. *Public Prosecutor* F.M. Criminal Appeal No. 12 of 1960 (unreported).

(17) *Public Prosecutor* v. *Yuvaraj* [1969] 2 M.L.J. 89, P.C.

MAGISTRATE'S CRIMINAL APPEAL.

Edgar Joseph Jr. (*Chan Choong Tak* with him) for the appellant.

Ahmad bin Abdul (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah J.: The appellant was tried in the sessions court, Port Dickson, on a charge of corruptly accepting an illegal gratification. He was convicted and fined $1,500 in default to six months' imprisonment by the learned president. Against this conviction he has now appealed. The learned public prosecutor has also filed a cross-appeal against inadequacy of sentence. The charge reads as follows: —

"That you on the 7th day of November, 1968, at about 7.30 p.m. at your quarters PWD. No. 215 Cunningham Road, Port Dickson, in the District of Port Dickson, in the State of Negri Sembilan, being an agent of the Government of Malaysia, to wit a Chief Inspector of Police, did corruptly accept a gratification, to wit a sum of $200/- cash from one Ng Ngee @ Ng Ah Kam (m) as an inducement for forbearing to do an act in relation to your principal's affairs, to wit not to proceed with the prosecution of the said Ng Ngee @ Ng Ah Kam on a charge of house breaking and theft by night under section 457 Penal Code; alternatively dishonestly retaining stolen property under section 411 Penal Code *vide* Port Dickson report No. 1577/66, and that you thereby committed an offence punishable under section 4(a) of the Prevention of Corruption Act No. 42/61."

Briefly, the facts of the prosecution are that the appellant arrested P.W. 1, P.W. 2 and one Mahadevan for theft of rubber. After they were charged in court and allowed bail, it was alleged that the appellant approached P.W. 1 and stated that he could obtain the release of P.W. 1 and Mahadevan and a light sentence for P.W. 2 if P.W. 1 would pay him $200. This was agreed to by P.W. 1 who was asked to bring the money to the appellant's house later. P.W. 1 then went to see P.W. 2 and Mahadevan, informed them of the appellant's demand and suggested that he himself would pay $100 and P.W. 2 and Mahadevan would raise the other $100. Both P.W. 2 and Mahadevan agreed. However, P.W. 2 made a report of the matter to the Anti-Corruption Agency at Seremban, and informed P.W. 1 about it the next day whereupon P.W. 1 also lodged another report. P.W. 1 was requested by the Anti-Corruption Agency to see the appellant in his house to confirm whether the appellant would still help to settle the case for $200. Having received confirmation P.W. 1 promised to bring the money that evening at about 7.00 p.m. on 7th November, 1968, to the appellant. The same day at about 4.30 p.m., P.W. 1 was briefed by an Anti-Corruption Agency officer (P.W. 6). He was to hand over $200 in cash to the appellant at the appellant's house that evening, if the appellant asked for it, but if he did not, P.W. 1 was to bring it back. Acting on arrangement P.W. 1 met P.W. 6 and other police officers at the Esso Refinery, Port Dickson, where an envelope containing $200 in $10 notes was handed by P.W. 6 to him. These notes were treated with anthracene powder by the Government Chemist (P.W. 7) and their serial numbers were also recorded. After taking the notes from the envelope and putting them in his shirt pocket P.W. 1 then proceeded to the appellant's house alone in his car. On arrival he saw the appellant wiping his car in front of the house wearing a pair of khaki shorts and shirt. At the request of the appellant both sat under the porch and after the appellant had asked P.W. 1 whether he had brought the money P.W. 1 took out the $200 cash from his shirt pocket and handed it to the appellant who, according to P.W. 1, received it with his right hand and put the money into the right pocket of his shorts. He further requested P.W. 1 not to tell anyone about it. After talking for a while P.W. 1 left for the Esso Refinery where he met P.W. 6 and his party. After asking P.W. 1 to wait there P.W. 6 proceeded to a spot where a group of three Anti-Corruption Agency officers (P.W. 10, P.W. 11, P.W. 12) had been keeping observation on the appellant's house about 60 yards away. After waiting for about half an hour they all proceeded to the appellant's house. On arrival they found the appellant inside the house but the $200 cash could not be found after a thorough search. However, a subsequent search of the appellant's car which was still in the front portion of the house resulted in the finding of the trap money hidden under the rubber matting covering the floor board in front next to the driver's seat. The appellant was arrested and brought to the police station where a cautioned statement was recorded from him. The appellant also lodged a report.

It should be mentioned that before this appeal, an application was made under section 400(1)(a) of the Criminal Procedure Code by the appellant for the production of relevant records of the previous convictions of the two principal prosecution witnesses, P.W. 1 and P.W. 2, who were jointly charged and convicted of the offence of theft of rubber sheets in a dwelling house under section 380 of the Penal Code and sentenced to imprisonment by the magistrate in Port Dickson. The case was proceeded with as a result of the arrests of P.W. 1, P.W. 2 and one Mahadevan by the appellant. It was connected with and mentioned in the charge against the appellant as regards the alleged acceptance of $200 illegal gratification from P.W. 1 and the subject matter of this appeal. After hearing the arguments of the learned defence counsel and the learned deputy public prosecutor, I allowed the application and accordingly made an order that the appellant be at liberty to adduce and read such evidence upon the hearing of this appeal.

The main ground of appeal was whether P.W. 1, the main witness to the charge on which the appellant was convicted, was an accomplice and whether as such he came under the protection of section 18 of the Prevention of Corruption Act. The learned president in his grounds was of the view that it was too early a stage to treat P.W. 1 as an accomplice considering the frame of mind that he was in, and that mere concurrence short of some actual participation in the crime was only indicative of an intention to participate. This he concluded was not envisaged by the provision of section 18 which, he said, provides certain amount of latitude in the admission of evidence of a person who would otherwise have been an accomplice, without corroboration. He relied on the dictum of Foster Sutton C.J. in *Daimon bin Banda* v. *Public Prosecutor*[1] which discussed the effect of section 13 of the Prevention of Corruption Ordinance, 1949, and agreed with the ruling of Taylor J. made in the court of first instance. Now, section 13 of the old Ordinance is substantially in *pari materia* with section 18 of the Act. Section 18 reads: —

"Notwithstanding any rule of law or written law to the contrary, no witness shall, in any such trial or inquiry as is referred to in section 17, be presumed to be unworthy of credit by reason only of any payment or delivery by him or on his behalf of any gratification to an agent or member of a public body."

Though the word "accomplice" does not appear, this section modifies the law and practice not as to accomplices generally, but only as to a specified class of accomplices so that a witness who is an accomplice only by reason of making a corrupt payment is not presumed to be unworthy of credit. (See *Soosay Dass* v. *Public Prosecutor*[2]). If, however, he has played a more active part in the transaction apart from the bare payment, he is not protected by the section and the ordinary rules as regards accomplices apply. (See *Daimon bin Banda* v. *Public Prosecutor, supra*). Considering the parts played in the case by P.W. 1, in the circumstances there was no doubt that his action went beyond concurrence, because after concurring, he went to see his two colleagues, P.W. 2 and Mahadevan, and suggested that each of them should raise the money to pay the appellant to which they all agreed. He did not make a report until after P.W. 2 had told him that he (P.W. 2) had already done so. In other words, he was quite prepared to bribe the appellant and negotiated with P.W. 2 and Mahadevan on the matter. In my view, this amounted to an infamous conduct and therefore he was an accomplice in the real sense of the word. The learned president ' therefore misdirected himself when he concluded that it was too early a stage to treat P.W. 1 as an accomplice.

It was urged by the learned deputy public prosecutor that P.W. 1 was an agent provocateur rather than an accomplice on the ground that prior to the commission of the offence he acted as agent for the Anti-Corruption Agency to set a trap for the appellant. He relied on *Lionel de Silva* v. *Regina,*[3] a Singapore case, in which a crown witness who acted as agent for the police admitted that previously he had been a party to the bribing of police officers and was held not to be an accomplice. I agree fully with that decision but the position is not the same here because P.W. 1 was an accomplice in the early stages of the transaction. There are many authorities on the matter but the principle is best illustrated in *Regina* v. *Mullins,*[4] where Maule J. said at page 530: —

"Barrett and Baldwinson, on the other hand, were really Chartists, concurring fully in the criminal designs of the rest for a certain time, until getting alarmed, or from some other cause, they turned upon their former associates, and gave information against them. These persons may be truly called accomplices."

This case was decided in England in which there were four witnesses whose character was considered. Two were police spies from the start and undoubtedly not accomplices. Barrett and Baldwinson were originally conspirators but Barrett informed the police only after arrests and Baldwinson did so before arrests were made.

Anyway, the learned president did not stop there but went on to consider P.W. 1 in his capacity as an accomplice. Taken in that light he maintained there was ample corroboration of P.W. 1's evidence by other independent evidence. He concluded that the prosecution had discharged its burden of proof that the appellant did receive the gratification. He also warned himself of the rules requiring corroboration by saying: "To this end I have warned my mind of the rules requiring corroboration . . . ". The argument before me by the learned counsel for the appellant was that the warning was inadequate because the learned president had failed to warn himself of the danger of convicting on the uncorroborated evidence of an accomplice. He cited several authorities including *R.* v. *Price*[5] and *Trowell* v. *Public Prosecutor.*[6]

In *R.* v. *Price* the Court of Appeal of England quashed the conviction of the appellant, an experienced medical practitioner, who was convicted of using an instrument with intent to procure a miscarriage. The main ground of acquittal was that the warning of the need for corroboration was in the circumstances not sufficiently precise, in that it failed, for example, to refer to the danger of convicting on the evidence of an accomplice and to make it clear that the jury should not act on the patient's uncorroborated evidence unless convinced that she was speaking the truth. There was evidence which the learned trial judge brought to the attention of the jury and to which the Court of Appeal concurred that it amounted to corroboration. However, apart from the inadequate direction there was non-direction on a most potent piece of corroboration. This was however a trial before a jury. Where the judge is hearing a case alone without a jury, the accepted principle is as quoted in *R.* v. *Ambler*[7] as summarised in the *English and Empire* 1940 Digest Supplement, page 48, (cited with approval by Horne J. in *Trowell* v. *Public Prosecutor*[6]): —

"In all cases wherein corroborative evidence of the description dealt with in *Rex* v. *Baskerville* [1916] 2 K.B. 658, is required and the trial is by a judge sitting without a jury, a conviction made on the uncorroborated evidence of an accomplice, without an accompanying statement being made by the judge showing that he convicted with an appreciation of the danger of so doing, should be set aside. If he sees fit to convict in the face of the admonition of courts past and present as to the danger of convicting upon the uncorroborated evidence of an accomplice he is at liberty to do so and his conviction will stand, provided he shows that the danger of so doing is present to his mind and the judgment is not otherwise objectionable. There may be a case in which a trial judge may fittingly convict upon the uncorroborated evidence of an accomplice, but this would be the very exceptional case."

The present case is also comparable with *Trowell* v. *Public Prosecutor, supra,* in which the magistrate did not give a proper warning as to the danger of convicting on the evidence of accomplices and in his grounds of decision he recorded words similar to what has been recorded by the president, namely, "I carefully directed my mind to the question of the need for corroboration". However, he failed to distinguish between witnesses who were and who were not accomplices and he regarded matters as corroborative which were not corroboration within the meaning used in *Rex* v. *Baskerville.* Horne J. found on examination of the evidence there was no corroboration.

It is clear that the learned president did not warn himself of the danger of convicting on the uncorroborated evidence of the accomplice (P.W. 1). Basing on strong authorities I must therefore lay stress on the need for adequate warning when evidence of an ac-

complice is being dealt with. It was the duty of the learned president to warn himself of the danger of convicting on such uncorroborated evidence even though independent corroborative evidence is available. (See *Davies* v. *Director of Public Prosecutions*[8]). This is so because the evidence which appears at first to be corroborative may not, upon careful examination thereof, be regarded as independent corroboration in the sense required for the purpose of corroborating the evidence of an accomplice. Secondly, as in this case, such evidence must be carefully and minutely scrutinised both singly and as a whole in order to ensure that its corroborative effect with the accomplice's evidence gives rise to one and only one reasonable and probable conclusion, *i.e.* the guilt of the accused and especially so when such corroboration is found on circumstantial evidence.

Now, the grounds of judgment show that the learned president relied on four pieces of evidence which he concluded were independent corroboration on which he convicted the appellant. He said: —

"I maintain that there was ample corroboration of his evidence (*i.e.* P.W.'s evidence) in the present case, namely, the evidence of P.W.2 and his report (P5) and also the significant presence of anthracene in the right hand pocket of the khaki shorts that the accused was wearing at the time of the incident (being the result of contact with the anthracene — carrying $200 notes) apart from the finding of the money in the accused's car."

As regards the first item, *i.e.* evidence of P.W. 2, he dealt with it at some length and the relevant part of the evidence that was consistent with P.W. 1's evidence was that on 5th November, 1968, at about 3.00 p.m., P.W. 1 came to his (P.W. 2's) house at Rantau and informed him and Mahadevan that the accused had asked for $200 in consideration for settlement of his case and that the share for both P.W. 1 and Mahadevan was $100 to which P.W. 2 agreed. An inference to what P.W. 1 had told P.W. 2 could not amount to corroboration of P.W. 1's story as it proceeded from P.W. 1 himself; P.W. 2 was only repeating what P.W. 1 had told him and in that sense P.W. 1 could not corroborate himself. (See *R.* v. *Whitehead*[9]). As regards P.W. 2's report (Ex. P5), the material part of the allegation against the appellant was hearsay and certainly did not amount to corroboration in accordance with the principles in *Rex* v. *Baskerville*. A police report is not of any genuine corroborative value even though it could be admitted as corroboration under section 157 of the Evidence Ordinance. Admissibility of a previous statement under that section must not be confused with the weight to be given to it. True, corroboration by independent evidence from an extraneous source should be distinguished from "corroboration" appearing in section 157 which rests on the principle that consistency between a previous statement by a witness and his present evidence may afford some ground for believing him. (*Per* Ong Hock Thye F.J. (as he then was) in *Mohamed Ali* v. *Public Prosecutor*[10] and in *Ah Mee* v. *Public Prosecutor*[11]).

Now, what is then corroborative evidence of the description dealt with in *Rex* v. *Baskerville*? It means corroboration under the common law in some material particulars tending to show that the accused committed the crime charged. It is not sufficient that the corroboration shows the witness to have told the truth in matters unconnected with the guilt of the accused. As Ong F.J. said in *Ah Mee* v. *Public Prosecutor, supra* at page 222: —

"Corroboration in the legal sense connotes some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence. . . ."

It is therefore apparent that the first two items which were regarded as independent corroboration is not corroboration which implicates the appellant or tends to confirm that he is guilty of the offence with which he is charged.

The third and fourth items are in my view material facts adduced by way of circumstantial evidence. The learned president had considered the evidence that led to the presence of anthracene in the right hand pocket of the khaki shorts which the appellant was wearing at the material time. However, he failed to take into consideration the fourth and last item as regards the finding of the $200 notes under the rubber matting of the appellant's car. This was a material piece of evidence which must be considered together with the third item in the absence of the finding of the money from the appellant's person and of direct evidence as to how and by whom the money had been placed there. It is apparent that more than one inference has arisen. It was urged by the learned deputy public prosecutor that since the appellant was the last person who had handled the money (as accepted by the learned president) it was only logical to infer that it was he who had placed the money well hidden under the mat. The absence of any trace of anthracene at or near the door handles of the car, he said, could be explained by the appellant opening the nearside front door with his left hand and placing the money under the matting with his right hand. I think it is unreasonable to make an inference based purely on an assumption without any iota of supporting evidence. On the contrary, the evidence of the Government Chemist (P.W. 7) showed that traces of anthracene were found on both the palms of the appellant's hands. He was of the opinion that if one touched an object with the hand containing anthracene, that object would be contaminated with anthracene because anthracene was sensitive and tended to stick on contact. It was not soluble in water and in order to erase it he had to decontaminate with spirit. Although it could be washed with plenty of water and wiped with a piece of cloth, there would still be traces of it. Indeed, the other inference which is reasonable and probable in the circumstances was that whoever placed the money there well knew of the presence of anthracene on the notes since he was careful enough not to leave any tell-tale marks on the door of the car or any part thereof. There was also evidence that when the police party arrived about half an hour after the incident, P.W. 1 had already left the house and that the car was left in the compound in front of the appellant's quarters. On careful examination of the prosecution evidence, there were in my view at least two instances when the car was not well under observation, *i.e.* at the time when the appellant entered his house after telling P.W. 1 to wait outside,

and at the time when P.W. 1 was left alone waiting in his car at the Esso station about 150 yards away. Considering the surrounding facts and circumstances, there was in my view ample opportunity for P.W. 1 to have placed the money in the car. No doubt, the learned president stressed the fact that when the money was discovered from the car the appellant was walking away fast but this piece of evidence alone was not sufficient in the circumstances to infer guilt. With respect, I am of the opinion that the learned president had failed to consider a material issue vital to the defence and such failure resulted in a miscarriage of justice. In cases of this nature it is difficult to obtain satisfactory evidence and it must be remembered that it is very easy to plant a case of this kind especially with regard to a strict and unpopular officer. An accomplice as P.W. 1 who had been arrested for a serious offence by the appellant would in all probability not hesitate to employ unscrupulous methods of transferring the notes in question to the appellant.

Both P.W. 1 and P.W. 2 in their evidence testified that the appellant had framed a charge against them for theft of rubber sheets. While P.W. 1 was careful enough to conceal his true feelings by saying that he was not angry with the appellant for having framed a case against him, P.W. 2 on the other hand categorically stated he was annoyed with the appellant for fabricating the charge and that he knew "the only way to punish a government servant was to report him for corruption". Surely, in my view, if the case had been framed, no prudent man would expect the appellant to be foolish enough to demand a bribe in order to settle the matter. On the contrary, it clearly indicated that because they both believed that the appellant had framed a case against them, they framed a case against the appellant in return — a tit-for-tat. The learned president had failed to consider this important issue *i.e.* whether the two witnesses had a purpose in reporting against the appellant. In this respect my attention was drawn by the learned counsel to the English case of *R.* v. *Prater*.[12] On the principle propounded in this case, I agree that where a witness in a criminal case may be regarded as having some purpose of his own to serve, whether he be a fellow-prisoner or a witness for the prosecution, it is desirable that the learned president should warn himself of the danger of convicting on that witness's evidence unless it is corroborated, but if there be clear and convincing evidence as satisfied this court that no miscarriage of justice had occurred by reason of the omission of the warning, the court will not interfere. Every case must be looked at in the light of its own facts. The result was that there was no clear and convincing evidence to point to the guilt of the accused and that a miscarriage of justice had occurred.

Moreover, the learned president did not have the advantage of considering additional evidence of the previous convictions of the two principal witnesses (P.W. 1 and P.W. 2) who were subsequently convicted of the charge against them which apparently proceeded in the magistrate's court, Port Dickson, in which the appellant gave evidence as a prosecution witness in his capacity as investigating officer. Both P.W. 1 and P.W. 2 were convicted and sentenced to four months and three months imprisonment respectively. Had this evidence been available during the trial, the credibility of the two witnesses could have been shaken by this evidence of previous conviction and that would have enabled the learned president to scrutinise the evidence with even greater care than usual, because not only was P.W. 1 an accomplice and a principal witness but also because the purpose of the alleged acceptance of the $200 gratification by the appellant was not to proceed with the prosecution against P.W. 1 for an offence as stated in the charge.

There was also considered by the learned president in his grounds evidence which he said pointed to the guilty mind of the appellant, namely, failure by the appellant to inform P.W. 10 of the incident immediately upon meeting P.W. 10 in his house on the night in question. On this he concluded that he was not satisfied with the appellant's explanation of his conduct and that the appellant's own version in asking P.W. 10 as to what he had done strengthened the prosecution case pointing to the guilty mind of the appellant. In other words, silence of the appellant was construed as pointing to his guilty mind. It has been held in a series of cases by the Court of Criminal Appeal in England that it was improper for the judge to invite the jury to make an inference against the accused person for his refusal to make a statement or for keeping silent after the caution had been administered. (See *R.* v. *Norman Davis*,[13] *R.* v. *Naylor*,[14] *R.* v. *Leckey*,[15] etc.). In all these cases, it was held that such inference amounted to a misdirection and the conviction in each case was quashed. In *Satkuru* v. *Public Prosecutor*,[16] the Court of Appeal quashed the conviction of the appellant on similar but much stronger grounds. There was however an oral judgment delivered, but from the written additional grounds of appeal and notes on record, it appeared that the learned trial judge in his grounds of judgment criticised the accused for his failure to give his version of the facts which he gave in evidence at the time he was arrested and at the preliminary enquiry notwithstanding the fact that the learned trial judge subsequently stated that he was putting it out of consideration. The English authorities cited appeared to have been followed.

In the light of the above, it is my considered judgment that the principle cited in the authorities applies to this case and the more so where there is no legal duty for the appellant to give an explanation. It follows that the learned president had misdirected himself in making such an adverse inference. On the other hand, the appellant had a right to know from P.W. 6 and his party as to what he had done that made them come to his house that evening. To impute a guilty mind on either of this is bad enough but to jumble both together and conclude that they strengthened the prosecution case is highly prejudicial to the defence. On this ground alone the conviction should be quashed.

The whole case depended on the slender thread of evidence relating to the finding of anthracene on the appellant's hands and in the right shorts pocket. But for this, as I have stated earlier on, there was nothing to implicate the appellant in any way. The

learned president after watching the demonstration given by the appellant as to how P.W. 1 had placed the money in his pocket, concluded that it was absolutely impossible for the appellant's right hand to contact anthracene in that manner and that the presence of anthracene in his pocket implied that the money must have come into contact with the inner lining of the pocket. In the case for the prosecution, what actually transpired depended solely on the evidence of P.W. 1 alone, namely, that he handed the notes to the appellant who took them and put them in his pocket. The learned president should have considered that P.W. 1 had handled the notes earlier when he received them from P.W. 6 and put them in his shirt pocket before he drove to the appellant's house, in which case his right hand at least came into contact with anthracene. There was evidence that both P.W. 1 and the appellant were seen sitting near each other on the porch talking and in the ordinary course of conversation P.W. 1 could have touched the appellant without either of them being conscious of it. Again, considering the position in which the appellant was standing near his car with one hand on the hood of the car, the money could have in all probability gone much deeper into his pocket than expected, and that when he held P.W. 1's hand, as he stated in his evidence and in his report, his hand too could have contacted anthracene. On the spur of the moment when an unexpected incident happened, it would not be reasonable to expect the appellant to remember every detail that had taken place even though he was a police officer. In addition, there was the explanation by the appellant that before he cleaned his car he took out the steel bangle from his hand as used to be his practice before washing his car in order not to scratch the paint and put it in his right shorts pocket. After cleaning his car he took it out and put it on again. His evidence in rebuttal was consistent with his police report which might afford some ground for believing him. The cautioned statement made by him to the police was never put in by the prosecution to impeach his credit under section 15(1) of the Act. Again, there was the evidence of the assistant controller of telecoms., Seremban, (D.W. 2) who stated he was aware that sometimes telephone calls in Port Dickson could not get through either because the number dialled was engaged or due to faults. He also confirmed that the peak hours were between 6.30 p.m. and 9.30 p.m. It must be noted that the time of the alleged incident when P.W. 1 claimed that he handed the money to the appellant was at 7.30 p.m. Immediately after this, according to the appellant, he dialled the police station in order to lodge a report but could not get through. In the circumstances, it was for the learned president to consider whether the defence has "disproved" the prosecution evidence within the meaning laid down by the Privy Council in *Public Prosecutor* v. *Yuvaraj*,[17] *i.e.* that the defence is not required to prove with exceptional degree of certainty as excludes all reasonable doubt that the fact does not exist, and it is sufficient if the court considers that upon the evidence before it, it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings, *i.e.* the balance of probabilities. In this regard, there was no difference with the defence of rebutting the presumption of corruption, as being reasonable and probable.

Taking into consideration the evidence of the appellant and that of D.W. 2, and in the light of the various irregularities in the prosecution case as discussed earlier, I am of the view that, with respect to the learned president, he has failed to consider the defence adequately in accordance with the accepted principles.

I therefore allow the appeal, set aside the conviction and quash the sentence. The fine, if paid, shall be refunded to the appellant.

Appeal allowed.

Solicitors: *Joseph & Son.*

SAFETY INSURANCE CO. LTD. v. WONG CHOO YONG

[F.C. (Ong C.J. (Malaya), Gill and Ali F.JJ.)
November 6 and December 24, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. 75 of 1970]

Practice and Procedure — Application for extension of time to file record of appeal — Reasons for application inadequate — Nothing said about merits of appeal.

The appellants had applied for extension of time to file their notice of appeal. The reason for the extension as stated in the affidavit in support of the application was that the appellants' solicitor was unable to file the record of appeal in time as although he had received the notes of evidence he had not received copies of certain exhibits which were to be included in the record of appeal. The affidavit did not say anything about the merits of the appeal.

Held: (1) the appellants had failed to show why they had not applied for copies of the exhibits from the proper quarter if their inclusion in the appeal record was considered absolutely necessary and in this case they could have filed the appeal record without the exhibits and have applied for the inclusion of the exhibits in the record at the time of hearing of the appeal;

(2) in any event nothing had been said about the merits of the appeal in the affidavit in support of the application and therefore the application must be dismissed.

Case referred to:-

(1) *Ceylon Motor Insurance Association* v. *Thambugala* [1953] 2 All E.R. 870.

FEDERAL COURT.

James Lau Tiong Jin on behalf of *K. E. Hilborne* for the appellants.

H. L. Wrigglesworth for the respondent.

The following judgment was delivered on November 6, 1970:

Gill F.J.: The appellants were the insurers of a motor lorry which on 8th July 1963 knocked down the respondent from his motor-cycle, thereby causing him very serious injuries. On 13th June 1966 the respondent obtained judgment against the driver and owner of the said motor lorry in civil suit No. 20 of 1965 in the High Court at Kuala Trengganu for a sum of $35,200 as general damages, $815 as special damages and costs, which were later taxed at $3,052.63 with interest thereon